December 2017

Variation and estoppel

Liquidated damages and estoppel - HSM Offshore BV v Aker Offshore Partner Ltd [2017] EWHC 2979 (TCC)

The question

How will a variation be interpreted and does it give rise to an estoppel in respect of rights under the original agreement?

The background

HSM is a specialist fabricator of offshore process modules and Aker is a global provider of products and services to the oil and gas industry. Aker engaged HSM in a standard form LOGIC sub-contract in 2014 to provide two process modules for the Clyde Platform in the North Sea.

After it became clear that the development was unlikely to meet the required date of 10 May 2015, the parties tried to resolve their difficulties with a Memorandum of Understanding (**MOU**) which amended the original contract. The MOU made a number of changes to how HSM would be paid and it replaced liability for liquidated damages with a duty to use "*fullest endeavours*".

The work was eventually completed by 10 August 2015. HSM later commenced proceedings against Aker for sums they claimed were outstanding.

Two of the issues the Court had to consider were whether Aker could bring a counterclaim for liquidated damages and whether Aker were estopped from challenging interim payments which had been made between June and August 2015.

The decision

Coulson J concluded that, on a true construction of the MOU, Aker could have no valid claim for liquidated damages.

Under the original LOGIC sub-contract, HSM was obliged to deliver the work by 10 May 2015. If HSM failed, it would be in breach of contract and would be liable to pay liquidated damages. But the MOU was agreed not only in clear knowledge that the original date would not be achieved, but in response to that fact.

The MOU also replaced the absolute obligation to complete by a specified date with an obligation for HSM to use "fullest endeavours". Coulson J found that this was not an absolute obligation to complete by a certain date, and so Aker could not counterclaim for liquidated damages.

In relation to the interim payments, Coulson J found that Aker's "approval" of HSM's monthly draft invoices did not prevent it from challenging these in the future. This meant that Aker was not estopped from arguing the sums were not due and payable under the terms of the MOU, read together with the LOGIC sub-contract. The LOGIC sub-contract clearly stated that the payment of an individual invoice, such as those paid to HSM between June and August 2015, did not waive or affect Aker's right to say that such a sum was incorrect or not properly payable.

Coulson J also noted that his conclusion that no estoppel arose was entirely in accordance with common sense and ordinary business practice.

Coulson J also made a wider point regarding contractual interpretation, commenting that: "*What matters is the objective meaning of the language, to be derived from the natural or usual meaning of the words used, when seen against the background/context of the contract; where there are rival interpretations, one test is to consider which interpretation is more consistent with business common sense*".

Why is this important?

This case is a good example of the issues that can arise from amendments to contracts and another application of the principles of contractual interpretation.

It is also confirms that approval/payment of interim invoices may not, of itself, prevent a party from challenging those invoices/the amount payable in the future.

Any practical tips?

Be careful when preparing variations to agreements – have you identified all of the changes that are needed, including consequential amendments to other parts of the agreement. If the changes are extensive, is it better to have a new agreement (or at least a conformed copy?).

Also, does there need to be any settlement or waiver of previous rights or claims if performance obligations are being relaxed?

Negligence

Assessment of damages on negligent valuation - Tiuta International Ltd (in liquidation) v De Villiers Surveyors Ltd [2017] UKSC 77

The question

How will a court assess damages in a claim for negligent valuation?

The background

Tiuta was a specialist lender of short-term business finance before going into administration in 2012. It advanced an initial loan facility for £2,475,000 in April 2011 in connection with a property development. The loan was secured by a legal charge over that development, which was valued by De Villiers at £2,300,000 in its original state and at £4,500,000 after it had finished development.

Shortly before the initial loan was due to expire, Tiuta advanced a second loan facility for c.£3.1m and took a fresh charge over the development. Approximately £2.8m of this sum was to be used to settle the first facility and £289,000 was new money to be used to complete the development.

Tiuta's advances under the second facility were made on the basis of further valuations from De Villiers, which upgraded its advice three times. At its highest, in December 2011, it valued the property at £3.5m in its current state and £4.9m after completion.

Eventually, the Borrower failed to repay the loan, the property proved to be worth less than its valuation and Tiuta alleged that De Villiers' December 2011 valuation in relation to the second facility were negligent.

The key question was whether Tiuta could recover all of it losses (c.£900,000) or whether its claim should be limited to the second loan facility's "new money" (£289,000).

The decision

The Supreme Court upheld De Villiers' appeal.

In the High Court, the judge applied the "but for" test to exclude all losses which did not arise as a result of the December 2011 valuation.

The Court of Appeal reversed this decision. Rather than apply the "but for" test, the Court looked at the role of the surveyor in the wider transaction. The Court, by a majority decision, thought it was irrelevant that some of the second loan facility was used to service a debt owed to Tiuta, and instead concluded they should look at the whole of the debt.

The Supreme Court unanimously overturned the decision of the Court of Appeal.
Lord Sumption commented that "*it does not follow from the fact that the advance under the second facility was applied in discharge of the advances under the first, that the court is obliged to ignore the fact that the lender would have lost the advances under the first facility in any event*".

The Supreme Court also called on the "basic comparison" in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627, which aims to restore the claimant as nearly as possible to the position they would have been in if they had not lent the monies based on the negligent advice.

Tiuta made no allegation of negligence with respect to De Villiers' valuation with the first loan facility, only in relation to the second loan facility. Therefore the amount of the second loan which was used to offset the first loan would have been lost regardless of the negligent valuation. Tiuta would not still have the money they lent under the second facility "but for" the negligent valuation, as this money had already been advanced. Lord Sumption noted it was a purely factual inquiry into how Tiuta would have been better off it if it had not lent the money which it had been negligently induced to lend.

Why is this important?

This Supreme Court decision clarifies the correct approach to assessment of losses for negligence.

Any practical tips?

If you are drafting agreements for the provision of consulting services or advice, be aware of the potential liability of ongoing or updated advice. Is this covered by limitations of liability and does the potential exposure change through the project?

Contractual interpretation

Defining the "ordinary course of business" - Koza Ltd and another v Akçil and others [2017] EWHC 2889 (Ch)

The question

What constitutes the “ordinary and proper course of business”?

The facts

The wider proceedings concern a dispute between rival parties over the management and control of Koza Limited. Under Turkish criminal proceedings, trustees were appointed to manage the company until further investigations had been completed.

In July 2016, there was concern that Koza would dissipate its assets. Koza provided an undertaking that it would only make payments “*bona fide in the ordinary and proper course of its business (whether that be existing or new projects)*”.

In December 2016. the Court was asked to decide whether Koza was able to incur certain expenditure, on the basis that it fell within the remit of “*ordinary course of business*” and if it did not whether the Order should be varied to permit it.

The decision

The Judge allowed two items to be permitted within Koza Limited’s ordinary and proper course of business, namely a payment to public relations advisers and remuneration to its CEO (up to a specified limit).

The Judge refused to allow payments to fund a proposed ICSID arbitration brought by a company that had become the parent company of Koza pursuant to an SPA. Although this could be of benefit to Koza (so the expenditure could be said to be in the “ordinary course of business”), there were concerns about the authenticity of the SPA, which meant that the payment may not have been made in good faith.

The Court suggested that the following factors be considered:

- would an objective observer, with knowledge of Koza, view the proposed expenditure as being made in the ordinary and proper course of its business?

- on a proper interpretation of Koza's undertaking, was the parties' intention that the proposed expenditure would be regarded as in the ordinary and proper course of business?
- subject to the above points, the fact that the expenditure was unprecedented or exceptional expenditure did not preclude it from being in the ordinary and proper course of business
- if the expenditure would be a breach of directors' duties then it may fall outside the ordinary and proper course.

Why is this important?

Although the Court has considered this in the context of a freezing injunction, the decision provides useful guidance as to the Court's approach to determining what amounts to the "ordinary and proper course of business". In particular, note that the Court considered that unprecedented or exceptional expenditure may still fall within "ordinary and proper course of business".

Any practical tips?

As with other general provisions (eg "reasonable endeavours"), if there are any particular matters that you want to be included or excluded from "ordinary course of business" these should be specified for certainty.

Notices

Requirements for valid service of a notice - Zayo Group International Ltd v Ainger and others [2017] EWHC 2542

The question

What amounts to effective service of a notice?

The facts

In 2014, Zayo bought all of the shares in Ego Holdings Limited, which until then had been owned by Ego's management team and a private equity house. The SPA contained a standard provision requiring Zayo to give the management sellers notice of any potential warranty claim within 18 months of completion.

The SPA stated that a notice was served if it was delivered by hand or sent by special delivery to the address of the relevant party set out in the SPA. If notice was served after 17:00. on a business day, it would be deemed served at 09:00. on the next business day. The SPA also had a clause allowing each party to notify the other of a change of address.

Zayo's lawyers instructed a courier to serve the notice of claim on the seven management sellers on Friday, 13 November 2015 (the final day under the SPA for serving the notice). The courier was able to serve the notice by hand on all but one of the management sellers. The last seller (Ms Jaggard) had relocated and she had not notified the other parties of this. Ms Jaggard later became aware of the claim notice when the new occupant informed her of it.

The management sellers applied to strike out Zayo's claim on the basis that Zayo had not effectively served notice on Ms Jaggard within the time limited specified in the agreement. Also, as the wording of the agreement stated that Zayo needed to serve notice on all of the management sellers, failure to serve on Ms Jaggard meant the claim was invalidated against all sellers.

The decision

The Court held that notice was not validly served. The notice clause was clear and unambiguous; there was nothing uncommercial about its construction. The key points were:

- the wording of the SPA was unambiguous; it clearly stated that notice was to be served by leaving it at the address listed in the agreement, not by delivering it to a person. Zayo did not accomplish this by the deadline
- the SPA did not contain any wording stating that Ms Jaggard had to notify a change of address. Therefore she had not breached the SPA and Zayo could not rely on this argument
- there was no mention of "attempting to deliver" in the SPA. The Court would need to imply terms into the SPA in order for this to operate correctly, which would only add to the uncertainty, rather than remove an issue.

Why is this important?

The decision underlines the importance of a well drafted and practical notices clause. It also highlights the need strict compliance the notice requirements, even if the intended recipient would not in fact have received the notice.

Any practical tips?

Make sure that your notice clauses are clear and workable. Seek to avoid having notices that are only effective if all parties are served; the notice should be effective as against each party served.

When serving notices, **always** follow the notice requirements strictly, even if you also send a further copy to where a recipient will in fact receive it. This may include leaving notices at the specified addresses even if they are historic/no longer occupied.

Guarantees

Guarantees unaffected by variation of agreements – Maxted and another v Investec Bank Plc [2017] EWHC 1997 (Ch)

The question

Will a variation of the underlying agreement invalidate a guarantee?

The facts

Investec entered into loan agreements with three companies. Two directors provided a capped guarantee for interest payable on the loans. The guarantee contained a standard "indulgence clause", which provided the guarantee would not be discharged by "any variation or amendment of any agreement between the bank and the debtors".

The loans were amended on various occasions to extend the terms and roll up accrued interest. Prior to these amendments, the guarantors had signed a confirmation of the guarantee and waived their right to seek legal advice.

When faced with a statutory demand for monies due under the guarantee, the guarantors argued that the guarantee had been discharged by serious amendments to the loan agreements, and that the confirmation of the guarantee had been obtained by Investec's undue influence.

The decision

The guarantors failed on both grounds.

The Court held that guarantees should be construed like any other contractual instrument – in other words, according to the intention of the parties and the natural meaning of the language used. On the facts, the amendments fell within the indulgence clause and did not impose any new obligations on the guarantors. Further, the guarantors had confirmed the guarantee and consented explicitly to the variations in the independent legal advice waiver. It would be "unreal" to divide their personal knowledge and their capacity as individuals from their knowledge as directors.

The guarantors' claim of undue influence (based on the argument that the indulgence clause gave rise to a relationship of trust and confidence with Investec) was also rejected. As men of business, the guarantors were capable of understanding the risks involved in the giving of guarantees. The relationship with the bank was purely commercial, and as such undue influence could not arise.

Why is this important?

This decision confirms that the commonly-used indulgence clauses are effective, so that the guarantee remains in place, notwithstanding amendments to underlying loan documents. But there are limits – particularly if an amendment imposes “a new and different obligation”, then the guarantee may no longer apply.

Any practical tips?

Always be careful when drafting a guarantee to provide additional security (eg from a parent company or director). In many cases, it is best to draft these as a “guarantee and indemnity” and you should always include the standard “indulgence clauses”. They will often be executed as a deed to provide consideration.

If there is a (substantial) change to the underlying primary obligation, consider revisiting/re-executing the guarantee (and indemnity).

Copyright

Copyright in TV formats - Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd & others [2017] EWHC 2600

The question

Can TV formats be protected by copyright as artistic works?

The background

Banner Universal Motion Pictures Ltd (**BUMP**) brought an action for copyright infringement which it claimed subsisted in the TV format for its game show "Minute Winner'.

BUMP alleged that, after pitching the concept for "Minute Winner" to one of the Defendants (the Swedish TV production company, Friday TV) in 2005, Friday TV (along with the other Defendants) went on to copy the format of "Minute Winner" by producing a similar gameshow called "Minute to Win It". "Minute to Win It" has been broadcast in over 70 countries worldwide, including the US and UK.

The concept for "Minute Winner" involved members of the public being given exactly one minute to try and win a prize. The show's format was set out in a short document (the **Minute Winner Document**) which included a short summary, the filming locations, and the prizes that could be won. BUMP claimed that copyright subsisted in the Minute Winner Document as an artistic work and that the Defendants had infringed this copyright by producing "Minute to Win It".

The decision

The court found that copyright could subsist in a TV format, but that in this case it did not.

Snowden J held that: "*it is at least arguable, as a matter of concept, that the format of a television game show or quiz show can be the subject of copyright protection as a dramatic work*". This is despite the fact that, due to their nature, such shows contain elements of spontaneity and events typically change from episode to episode.

Snowden J also went on to consider the minimum requirements that must be met in order for copyright to subsist in a TV format as an artistic work:

- there must be a number of clearly identified features which, taken together, distinguish the TV show from others of a similar type, and
- those distinguishing features must be connected with each other in a coherent framework, which can be repeatedly applied so as to enable the show to be reproduced in a recognisable form.

However, Snowden J found that copyright did not subsist in BUMP's Minute Winner Document as it "*did not identify or prescribe anything resembling a coherent framework or structure which could be relied upon to reproduce a distinctive game show in a recognisable form*". Snowden J highlighted that the performance of a task against the clock to win a prize was a common feature of game shows.

The Minute Winner Document was also vague on key pieces of information, such as the type of one minute tasks, who the contestants should be, and the length of the programme. Snowden J also noted that even if BUMP could show copyright subsisted in its Minute Winner Document, its format was "*different in every material respect*" from that used in Minute to Win It.

Why is this important?

This decision confirms that TV formats can be protected under English copyright law. To attract copyright protection as an artistic work, TV formats must contain distinctive features and these must be joined together in a coherent framework enabling the show to be reproduced in a recognisable form.

Any practical tips?

Production companies who want to protect their formats should document as much information as they can about the format, with sufficient detail to distinguish it from previous formats and to allow it to be repeated in a recognisable form.

Online platforms

Internet Safety Strategy green paper

The background

The internet is now all but ubiquitous, and there are growing public concerns about online safety. The issues range from online trolling, to hate speech, to location-sharing within social media platforms.

The development

On 11 October 2017, the government published its Internet Safety Strategy green paper as part of its strategy to ensure that Britain is the safest place in the world to be online.

The green paper is underpinned by three principles:

- what is unacceptable offline should be unacceptable online
- all users should be empowered to manage online risks and stay safe
- technology companies have a responsibility to their users.

Social media code of practice

In 2018 the government will issue a new, voluntary social media code of practice, as required by the Digital Economy Act 2017. This will seek to ensure that providers offer adequate safety policies, introduce minimum standards and ensure regular review and monitoring. The code will address bullying and insulting conduct online, as well as other behaviour likely to intimidate or humiliate (under s10(3) of the Digital Economy Act 2017). The government expects this to be a key tool in tackling conduct like trolling. The code will not cover unlawful content, as that is already covered by the legal framework.

The code will also include, as required by s103(5) of the Digital Economy Act 2017, guidance on:

- maintaining arrangements to enable individuals to notify conduct to the provider
- maintaining processes for dealing with notifications
- ensuring relevant matters are clearly included in the terms and conditions for using platforms
- information given to the public about action providers take against their platforms being used for harmful conduct.

Transparency

The green paper includes questions on the possibility of working with industry to produce an annual internet safety transparency report. This would include facility for benchmarking reporting mechanisms, and would be used to guide any future policy interventions in the area.

The transparency report could be used to show:

- the volume of content reported to companies, the proportion of content that has been taken down from the service, and the handling of users' complaints
- categories of complaints received by platforms (including by groups and categories including under 18s, women, LGB&T, and on religious grounds) and volume of content taken down
- information about how each site approaches moderation and any changes in policy and resourcing.

Social media levy

The government plans to introduce a levy, to support greater public awareness of online safety and enable preventative measures to counter internet harms. The levy will aim to be proportionate, and not stifle growth or innovation, particularly for smaller companies and start-ups.

The levy will (at least initially) secure contributions on a voluntary basis. The green paper compares it to the levy set out in the Gambling Act 2005, where in practice the sector provides voluntary contributions and support without the need for legislative input.

Encouraging technology firms to "think safety first"

The Department for Digital, Culture, Media & Sport (**DCMS**) will work with industry bodies like TechCity UK to support start-ups at the very earliest stages of their development to help build online safety features into new products from the start.

The consultation emphasises the business benefits of getting online safety right, including simple reporting mechanisms and quick response times to complaints. It gives the example that lack of reporting on new apps can lead to them being used to send inappropriate or harassing content. Including reporting from the start would greatly improve customer experience and save the business from future complaints and the need for app redevelopment.

The government will work with app store providers on the most effective way to implement new protections for minors, and to promote clearer, more uniform safety features in app descriptions. The Google Play Store and Apple's App Store are cited as good examples of platforms promoting safety features, but the green paper welcomes more consistency across the industry.

Digital literacy

The government is keen to promote children's digital literacy, in part to tackle the growing trend that online behaviours fail to meet the standards that we expect from children in the "real world". It also wants children to be able to critically interpret content they view online, including to recognise commercial content and question the legitimacy of information (eg fake news). The DCMS and Department for Education expect digital literacy, including online citizenship, to form a compulsory part of the school curriculum.

Support for parents and carers

The green paper is also concerned with empowering parents, carers and teachers in talking to their children about online safety. The government wants to see consistent, easily accessible, well-publicised advice for parents. DCMS plans to work with trusted partners to raise the level of awareness around innovative technology solutions for parents.

Police response to online hate crime

As part of the Internet Safety Strategy, the Home Office will create a new national police online hate crime hub, staffed with specialist officers. All reports of online hate crime will be channelled through this hub.

Online dating and networking sites

Recent years have seen an explosion in the popularity of apps and social media services which enable users to make social, romantic, and sexual connections. The green paper notes that while some services are strictly oriented towards adults through their terms and conditions, this is not always enforced.

Primary responsibility for enforcing the law on child sexual exploitation lies with the police. However, the government considers that there is a role for companies providing adult-oriented services, to ensure that their user-base is over the age of consent and to prevent solicitation and contact between adults and children. There is also a role for users in identifying at-risk individuals, and flagging them to review teams. The government will work with companies providing these services to review processes and procedures.

Online pornography

The Digital Economy Act 2017 introduced requirements for online pornography provided on a commercial basis to be inaccessible to under-18s. The DCMS intends that a system of robust age verification barriers will be in place during 2018. This will create a regulatory framework that will disrupt the business of non-compliant sites. This should reduce the chances of a child stumbling across pornographic content online, and allow every child to develop at the time that suits them.

Why is this important?

Will this be the end of the online Wild West? Clearly, the government is no longer happy to allow users and providers a free reign online, where it would interfere with the rights of others.

The green paper cites disturbing statistics. For example, in the past year, almost one fifth of 12-15 year of olds encountered something online that they "found worrying or nasty in some way"[1]. Surveys show that parents are now more worried about their children sexting than they are about them drinking or smoking.[2]

The government is keen to work with industry, and much of its strategy relies on voluntary contributions from the sector. Although not compulsory, any companies which are slow to act will risk serious negative publicity.

Any practical tips?

Businesses which stay ahead of the curve and implement innovative safety features will reap the rewards in customer engagement and regulatory approval.

Companies should prepare to work with government bodies, regulators, and to be visible in their support for new internet safety initiatives.

The green paper can be found at https://www.gov.uk/government/consultations/internet-safety-strategy-green-paper.

[1] Children and parents: media use and attitudes, Ofcom (2016) https://www.ofcom.org.uk/__data/assets/pdf_file/0034/93976/Children-Parents-Media-Use-Attitudes-Report-2016.pdf
[2] https://www.pshe-association.org.uk/news/parents-call-education-address-sexting-children

Online Platforms

Commission communication on tackling illegal content online

The development

The European Commission (**Commission**) has published a Communication containing non-legally binding guidelines for online platforms on preventing, detecting, removing and disabling access to illegal content.

The background

On 28 September 2017 the European Commission published its Communication on "*Tackling Illegal Content Online*" (**Communication**).

Whilst acknowledging that online platforms are an important part of a thriving digital economy, the Commission stressed that "*those online platforms which mediate access to content for most internet users carry a significant societal responsibility in terms of protecting users and society at large*".

The Communication itself appears to be a result not only of calls by the European Parliament (for example in its resolution on Online Platforms of June 2017, urging platforms to "*strengthen measures to tackle illegal and harmful content*"), but also from statements issued by the G7 and G20 Leaders and the European Council in 2017. The Communication also underpins the EU executive's flagship Digital Single Market strategy which aims to "*open up digital opportunities for people and business and enhance Europe's position as a world leader in the digital economy*".

In the Communication, the Commission took the opportunity to confirm that at EU level, the E-Commerce Directive 2000 (**Directive**) provides exceptions from liability for illegal content which platforms host (Article 14) and that Article 15 prohibits Member States from imposing "*a general obligation on providers, when providing the services covered by Article 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*".

In this context therefore the aim of the Communication is to encourage a form of self-regulation by facilitating and intensifying the implementation of good practices for preventing, detecting, removing and disabling access to illegal content so as to ensure the effective removal of illegal content without impacting upon the safe harbour afforded to online platforms via Article 14 of the Directive. On this point, the Communication states that:

"*It follows that proactive measures taken by an online platform to detect and remove illegal content may result in that platform obtaining knowledge or awareness of illegal activities or illegal information, which could thus lead to the loss of the liability exemption in accordance with point (a) of Article 14(1) of the E-Commerce Directive. However, in such cases the online platform continues to have the possibility to act expeditiously to remove or to disable access to the information in question upon obtaining such knowledge or awareness. Where it does so, the online platform continues to benefit from the liability exemption pursuant to point (b) of Article 14(1). Therefore, concerns related to losing the benefit of the liability exemption should not deter or preclude the application of the effective proactive voluntary measures that this Communication seeks to encourage*".

Platforms are encouraged to:

- systematically enhance their cooperation with competent authorities in Member States, while Member States should ensure that courts are able to effectively react against illegal online content online
- appoint effective points of contact in the EU and define effective digital interfaces to facilitate their interaction
- develop technical interfaces with law enforcement authorities and technical community to cooperate more effectively on the entire content governance cycle and advance sound solutions to the challenge
- cooperate with trusted flaggers so as to improve the removal process over time;
- establish an easily accessible and user-friendly mechanism that allows their users to notify content considered to be illegal, and
- put in place effective mechanisms to facilitate the submission of notices that are sufficiently precise and adequately substantiated to enable the platforms to take a decision as to the appropriate follow up.

Why is this important?

Whilst the exception under Article 14 of the Directive remains unchanged, the Communication places a burden on online platforms to proactively detect and decide what constitutes an illegal activity – which is not always easy given the element of subjectivity involved. And of course some acts are easier to spot than others. Online platforms will no doubt take heed of the Communication as it reinforces the second condition to be fulfilled if platforms wish to fall under the exception under Article 14 – ie the need to act expeditiously to remove or to disable access to the information. The difficulty is that arguably the Communication contradicts Article 15 of the Directive, by placing a "general obligation" on platforms to monitor content which users post on their services.

The Commission is seeking a standardised and voluntary regime to deal with illegal content across the EU, so as to further strengthen and protect the Digital Single Market and also to encourage platforms to embrace their societal role and responsibility. Whilst burdensome, the platforms may feel that this Communication, being non-legally binding, is preferable and less risky to comply with than numerous different laws and regulations at a national level. Only time will tell if this gentle voluntary approach is successful or not.

Online platforms
EU Online Platform Bill

The development
Search engines, app stores and other online platforms are facing new transparency obligations in relation to their contracts with other businesses in a new EU draft Bill proposed to be introduced next year.

The background
Whilst acknowledging that online platforms are an important part of a thriving digital economy, the European Commission wants to ensure that platforms operate properly and that illegal content is removed.

In May 2016, the European Commission published the Communication on Online Platforms, which identified the main areas where further attention is needed to ensure a "*trusting, lawful and innovation-driven ecosystem*" around online platforms. The guiding policy principles pursued by the Commission are:

- a level playing field for comparable digital services
- ensuring that online platforms behave responsibly to protect core values
- fostering trust, transparency and ensuring fairness
- keeping markets open and non-discriminatory to foster a data-driven economy.

The Commission went on to state that "*there is widespread concern that some platforms may favour their own products or services, otherwise discriminate between different suppliers and sellers and restrict access to, and the use of, personal and non-personal data, including that which is directly generated by a company's activities on the platforms*". The Commission continued that "*some online platforms remove products from search results without due notice or without any effective possibility to contest the platform's decision*".

The Commission has set out specific actions in its 2018 work program, to address the issues of unfair contractual clauses and trading practices identified in platform-to business relationships, exploring dispute resolution, fair practices criteria and transparency. The intention of the actions is to underpin and move forward the EU executive's flagship Digital Single Market strategy which aims to "*open up digital opportunities for people and business and enhance Europe's position as a world leader in the digital economy*".

The EU believes that the transparency obligation will address the issues that companies experience when ascertaining how to gain prominence on certain search engine systems. It is also expected that the draft bill will look at other sectors, such as the ranking of online retailers on Amazon and eBay, hotels on Booking.com and apps on the Google Play store. The proposal also seeks to establish a dispute resolution procedure for companies who wish to contest their rankings and ratings on such platforms.

Why is this important?

The proposed Bill marks a shift in previous Commission communications which suggested there would be no sweeping legislation in this area, and has drawn criticism from associations representing online platforms like Amazon, Airbnb and Google.

The EU's steps seem to be partly in response to a 2016 Eurobarometer survey in which 66% of small and medium-sized businesses responded that their sales are significantly affected by how platforms position them in search results. More worrying still, there appears to have been hints that transparency measures may extend to platforms' algorithms but this has not been confirmed. This is one space which definitely needs watching as the Commission continues its march towards a more level playing field as part of its Digital Single Market strategy.

Data protection

No ICO notifications, but fees continue under GDPR

The development

The Information Commissioner's Office (**ICO**) has provided guidance as to how its notification and fee regime will change when the General Data Protection Regulation (**GDPR**) comes into force in May 2018.

The changes

The ICO has ended the need for data controllers to notify and complete an entry on its register of data controllers. Currently, notification requires a fee of either £35 or £500, depending on the size of the data controller.

The ICO has however announced that it will continue to levy fees from data controllers so as to fund its increased workload from May 2018. The new process that will be put into place under the Digital Economy Act is a three tier system which categorises and charges fees to data controllers according to their size (number of employees and turnover) and the amount of data they process.

The ICO remains in discussions with the Department for Digital, Culture, Media and Sport (**DCMS**) as it develops the new system. Proposed annual fees will range from up to £55 for Tier 1 organisations, up to £80 for Tier 2 organisations and up to £1000 for Tier 3 organisations.

The intention is therefore to create a fair and simple system of funding and the DCMS will confirm later on in the year if current limited exemptions to the notification obligation are likely to be carried over to the new funding system, so that data controllers who only carry out data processing for purposes such as judicial functions, marketing their own business and staff administration will not be required to pay a fee.

The new model is intended to go live on 1 April 2018, however data controllers are still under an obligation to renew their notifications, where this renewal falls between now and 1 April 2018. Not renewing remains a criminal offence until the new model kicks in.

Why is this important?

The abolition of the obligation to register as a data controller reflects an understanding by the ICO that such schemes had largely become box-ticking exercises and is one of the few areas where the GDPR appears to lighten the administrative burden for data controllers.

The abolition is consistent with Recital 89 of the GDPR, which calls for "*indiscriminate general notification obligations to be abolished*".

Any practical tips?

Multi-national organisations should note carefully the limitation of Recital 89 to general notification obligations. Many other EU Member States have implemented more specific notification requirements which relate to particular data processing activities (for example, whistleblowing or international transfers), and it can be argued that such requirements are not indiscriminate or general in nature, and therefore may be retained by Member States post May 2018. Consequently, there will be a requirement for organisations to continue to monitor notification requirements across the EU, particularly as they implement higher risk data processing arrangements.

Data protection

ICANN/WHOIS and the GDPR

The question

How will the General Data Protection Regulation (**GDPR**) affect the world of internet policy and systems of domain name registration?

The background

The Internet Corporation for Assigned Names and Numbers (**ICANN**) is a non-profit organisation responsible for coordinating the maintenance and procedures of several databases related to the namespaces of the Internet. The WHOIS system is an open access service which publishes the name, address, company (if applicable) email address and telephone number of every domain name registrant. Having been created in 1982, it has always been seen as somewhat problematic in relation to the protection of individuals' privacy

In 2013, the initial report of ICANN's Expert Working Group recommended that the present form of WHOIS should be abandoned and replaced with a system that keeps most registration information secret or "gated" from most internet users and only discloses information for permissible purposes. The list of permissible purposes includes domain name research, domain name sale and purchase, regulatory enforcement, personal data protection, legal actions and abuse mitigation.

The development

The GDPR will impact all parties that contract with ICANN, including registrars, registries, data escrow companies and even ICANN itself. ICANN is both a data processor and data controller as it determines the requirements for data collection for domain registration and how the data is dealt with.

Why is this important?

WHOIS is a tool used by many companies and individuals to determine the owners of different domains; a practice increasingly more important as the value of domains increase. It is an effective tool in domain name regulation and legal disputes revolving around similar domain names including those taking unfair advantage of strong brands. But at its core WHOIS is all about personal data and the GDPR threatens its existence, at least in its current form.

ICANN is currently in the process of "reinventing WHOIS" and working on an "ICANN WHOIS beta" although this has yet to publicly progress. It seems that they are looking to replace the WHOIS system with a Registration Directory Service (**RDS**). The RDS would involve public access to some registration data which would have purpose-based disclosure and then gated access to more sensitive data. This would require the requestor to be accredited and have a Requestor ID.

ICANN has stated that the GDPR could affect its ability to maintain a single global WHOIS system, with two large generic top-level domains withdrawing public access to registrant information already. Changing WHOIS to either a "need-to-know" or RDS basis will change the approach currently used regarding data storage and publication. It's a classic tug of war over how strictly WHOIS should be regulated. On the one hand, judicial authorities and intellectual property practitioners are striving to have better access to data in order to act against infringements and cybercrimes, on the other privacy and data protection groups want a strict approach over the access and storage of data to protect the privacy of the web.

What next?

It's hard to tell but hopefully we can expect potentially tiered (or gated) access to certain elements of WHOIS – for example, full data availability for law enforcement, lawyers and those with intellectual property interests, but not full access for the public. In the meantime, it's possible that we'll see more registrars turn off their WHOIS data access in the run up to the GDPR; registrars are already on record threatening to do so.

Data protection

ICO draft guidance on contracts between data controllers and data processors

The question

What must be included within a contract between a data controller and a data processor to ensure compliance with the General Data Protection Regulation (**GDPR**)?

The background

The GDPR significantly alters the balance of obligations, responsibilities and liabilities between controllers and processors of data. It mandates that when a controller uses a processor, it must have a written contract in place covering data security and all key aspects of the relationship.

The development

The Information Commissioner's Office (**ICO**) has issued draft guidance to assist organisations in preparing or updating their controller/processor contracts. The ICO confirms its interpretation of the GDPR, and provides a general recommended approach to ensure compliance.

The ICO outlines that, as per the GDPR, controller/processor contracts must set out:

- the subject matter and duration of the processing
- the nature and purpose of the processing
- the type of personal data and categories of data subject, and
- the obligations and rights of the controller.

Further, the following mandatory minimum terms must be included, requiring the processor to:

- only act on the written instructions of the controller
- ensure that people processing the data are subject to a duty of confidence
- take appropriate measures to ensure the security of processing
- only engage sub-processors with the prior consent of the controller and under a written contract
- assist the controller in allowing data subjects to exercise their rights under the GDPR
- assist the controller in meeting its GDPR obligations, and
- delete or return all personal data to the controller as requested at the end of the contract.

The ICO also outlines the key responsibilities of each party. Controllers, for instance, will ultimately be responsible for ensuring that personal data is processed lawfully – regardless of the use of a processor, the controller may be subject to any of the sanctions set out in the GDPR. In a similar vein, if processors act outside the documented instructions of a controller, they will be considered a controller and be subject to the same liabilities and sanctions. Sub-processors won't escape the responsibilities either – their contracts must contain the same legal obligations as set out in the main contract.

Another difference is that processors now have direct responsibilities and obligations under the GDPR, outside the terms of the contract. Processors can be held directly responsible for non-compliance with these obligations, or the contract terms, and may be subject to administrative fines or other sanctions and liable to pay compensation to data subjects.

Why is this important?

Although the requirement for controller/processor contracts is not new (and, indeed, already considered good practice by most organisations) the level of detail and mandatory terms outlined by the GDPR represent a significant change.

Any practical tips?

Contracts in place on 25 May 2018 will need to meet the new GDPR requirements – so now is the time to check whether your current agreements contain all the necessary elements. The changes required by each organisation will be dependent on how the business' contracts currently deal with data protection.

Data protection

ICO issues TalkTalk monetary penalty notice for inadequate safety measures

The development

On 7 August 2017, the Information Commissioner's Office (**ICO**) fined TalkTalk £100,000 under s55A of the Data Protection Act 1998 (**DPA**) after an investigation found that it had failed to take adequate security measures to protect customer data from unauthorised access via web-based portal.

The facts

In 2004, TalkTalk provided Wipro Limited (**Wipro**), a multinational IT services company that resolved network issues on Talk Talk's behalf, with access to a portal that contained the personal information of between 25,000 and 50,000 customers. According to the investigation, in 2014, certain employees of Wipro used the portal to gain unauthorised access to customer data which included names, addresses and phone numbers.

The decision

The ICO's investigation found that TalkTalk had failed to take due regard to:

- the state of technological development
- the cost of implementing any measures
- the nature of the customer data, and
- the harm that might result from its misuse.

TalkTalk had therefore contravened the seventh principle of the DPA, by not ensuring that appropriate technical and organisational measures had been taken to protect against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. The ICO found that TalkTalk had:

- provided 40 Wipro employees with access to the customer data without any controls in place to either limit access to the customers themselves or to just the fields that were actually required for Ofcom reporting
- enabled Wipro employees to enable access to the portal from any internet-enabled device rather than just to devices linked to Wipro, and
- enabled Wipro employees to make "wildcard" searches, view large numbers of customer records at any one time and to bulk download data (although there was no evidence that this had occurred). There was no adequate justification for those capabilities.

The ICO considered that TalkTalk's contravention comprised of a number of serious and material inadequacies and that those inadequacies were systematic (from 2004 until 2014). The ICO further said that TalkTalk ought to have been aware that a contravention would have occurred; that it had failed to prevent this and that any such contravention was likely to cause substantial damage and distress. In the light of this and the importance of deterring future contraventions by TalkTalk and others, the ICO issued the monetary penalty under s55A of the DPA.

Why is this important?

It's likely that data protection compliance was not at the front of mind of those negotiating the original Wipro deal. After all, this was back in 2004. But the fine highlights just how alive businesses (and lawyers) need to be to data regulation when outsourcing services to third parties. It goes without saying that the stakes get much higher when the General Data Protection Regulation (**GDPR**) comes into force, especially with the increased fining powers for regulators.

Data protection

Irish High Court asks CJEU to rule on validity of Model Contract Clauses (Schrems II)

The question

Are Model Contract Clauses (or “Standard Contract Clauses” – **SSCs**) valid under EU data protection law?

The background

After successfully bringing down the US-EU Safe Harbour in Schrems I – the ECJ ruling that the mechanism failed to provide the personal data of EU citizens with an effective level of protection – Max Schrems reformulated his complaint to the Irish Data Protection Commissioner (**DPC**) in order to take aim at SCCs, upon which the target of Schrems’ campaign, Facebook, had also relied.

Like the Safe Harbour and its successor, the Privacy Shield, SCCs are a mechanism approved by the European Commission that allows the transfer of personal data from the EEA to a jurisdiction that has not been deemed to have an “adequate” data protection regime (with the clauses directly requiring parties to maintain a minimum level of compliance).

Having conducted an investigation into the reformulated complaint, the DPC applied to the High Court seeking a preliminary reference to the ECJ to consider the SCCs, as the ECJ had itself ruled in Schrems I that it had sole jurisdiction to strike down a Commission adequacy decision.

The development

In a 152-page judgment, Ms Justice Costello decided to ask the ECJ to rule on the validity of SCCs, finding that, in particular, the DPC’s concerns over the availability of an effective judicial remedy under US law – as required by Article 47 of the Charter of Fundamental Rights of the European Union – were “well-founded”.

As with Schrems I, it was the mass processing of personal data by US security agencies that was at issue, with expert evidence suggesting that such processing by government agencies was “*indiscriminate*”, if not amounting to “*mass surveillance*”. This potential unlawful processing was thought to be compounded by restrictive rules on the standing of EEA citizens to bring cases before US courts.

As the SCCs themselves contain no terms to address these sorts of concerns, their validity is called into question. In particular, the Court is asking the ECJ to consider whether general provisions enabling a national data protection authority to ban or suspend data transfers to specific third countries (Article 4 of the SCCs) provide sufficient redress for data subjects to render the SCCs valid.

Why is this important?

Unlike many blockbuster sequels, Schrems II may yet have as big an impact as its predecessor. Like Facebook, many organisations rely on SCCs to transfer personal data between the EEA and other countries – particularly the US. If SSCs are struck down, companies will need to establish a new mechanism of transfer. It's likely that new SCCs will be approved by the Commission to comply with GDPR, which could resolve the concerns.

The Privacy Shield also remains for the time being, but it may be in danger if it is decided that US conduct in relation to data surveillance means that SCCs cannot be relied upon.

Any practical tips?

For lack of a better alternative, there is little option other than to continue to use SCCs until the ECJ provides its ruling (likely in 12 to 18 months). The ECJ is still in the early stages of consideration. One hopes that data transfer landscape will not look considerably different by the time it finishes!

Data protection

Updates to the draft ePrivacy Regulation

The development

On 19 October 2017, the European Parliament approved a revised draft of the ePrivacy Regulation. Though still subject to negotiation, it introduces a number of important changes, and deserves careful study by every online communications business.

The ePrivacy Regulation will replace the ePrivacy Directive, and is intended to complement the General Data Protection Regulation (**GDPR**) in the area of "electronic communications data". It includes detailed provisions on direct marketing, cookies and online monitoring. It was originally scheduled to come into force on the same date as the GDPR, 25 May 2018, but timing of its actual implementation is currently unclear. It is still in the early stages of the legislative process, as it is currently entering the Trilogue process (informal tripartite meetings between representatives of the European Parliament, the European Council and the European Commission, which take place prior to plenary sittings of the European Parliament).

The changes

"*What we are aiming at is to abolish surveillance-driven advertising.*"

These chilling words are those of Birgit Sippel MEP, in her first public address as the European Parliament's Special Rapporteur with responsibility for the draft ePrivacy Regulation (9 November 2017). Sippel's speech encapsulates the firm stance European legislators seem to be taking towards online behavioural advertising and the technology behind it. The current draft of the Regulation brings a raft of changes, many of which may cause significant disruption to the sector.

The key changes are as follows:

- a major tightening on the rules regarding cookies. The EU's new proposal would require companies to obtain explicit consent for every cookie "dropped". When seeking consent, publishers should present the information in a clear, granular manner, giving the user the best opportunity to make an informed choice. Websites cannot make consent to cookies a mandatory condition of accessing the service
- cookie walls and banners are to be banned. The EU's "solution" is to offer users control by means of browser settings, in an apparent attempt to protect non-savvy users who simply accept cookies without reading the relevant cookie policy. Crucially, the current proposal stipulates that the default browser settings should be set to the most privacy

friendly option – prohibiting cookies. Users would need to take an active step to consent to cookies at a browser level, although websites could still seek consent on a case-by-case basis

- the applicability of GDPR-level fines has been extended to include breaches of the provisions on consent and privacy settings for cookies. The maximum fine under these rules is now 4% of global annual turnover, or €20 million, whichever is higher
- a clarification that explicit consent will be required for direct marketing (subject only to the "soft opt-in" exception for existing customers). The ePrivacy Regulation has not adopted "legitimate interests", which offer alternative legal bases for processing under the GDPR.

Any practical tips?

If the Regulation went ahead in its current form, it could frankly be disastrous for many within adtech and related industries. Recent research has suggested that 81% of users would not consent to having their behaviour tracked by third parties (eg by use of cookies). Marketers who use programmatic behavioural advertising reliant on third party cookies may struggle to attain reach under the proposed system, though platform providers using first-party cookies are likely to be less affected. We may see a shift in power to publishers, who could possibly ask to be compensated for obtaining marketing consents from users. On the other hand, they may begin to offer incentives to users for accepting cookies, for example with smoother, personalised services.

There are no easy answers, and new technology may be needed before a true solution can be found. All communications companies will need to innovate, and find new ways to engage with their user base.

What is clear, given the GDPR-level fines for non-compliance, and the tough attitude of EU legislators, is that companies who ignore (and fail to prepare for) the Regulation will do so at their peril.

The most recent updates to the ePrivacy Regulation can be found here: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2017-0324&language=EN.

ASA

ASA Ruling on Diamond Whites (25 October 2017) – impact of long-standing commercial relationships on marketing

The question

Can you rely on a long-standing commercial relationship as evidence that media content is "obviously identifiable" as marketing material?

The facts

Geordie Shore TV star Marnie Simpson released an image within her Snapchat story in which she held a Diamond Whites tooth polish product close to her face. Text on the snap stated "*50% off everything from Diamond Whites! Swipe up [heart emoji]" and "www.diamondwhites.co.uk*".

The complaint

The complainant challenged whether the advertisement was obviously identifiable as a marketing communication.

The response

Diamond Whites highlighted that Ms Simpson had been the face of their brand for nearly two years and regularly spoke and posted about them. They therefore believed that her followers were aware of the commercial relationship, so the posts did not require hashtags etc. However, they said they would look to put those in place in the future.

Diamond Whites refused to disclose the information requested by the ASA about the contractual relationship with Marnie on the basis of confidentiality.

The decision

Without Diamond White's contract with Ms Simpson, the ASA did not know whether she was explicitly obliged to publicise that particular promotion. However, they decided that even if the contract was silent on that point, the snap was nonetheless directly related to her general promotional activity for the company. Therefore, the ASA found that the snap was a marketing communication and thus fell within their remit. In any case, Diamond Whites had not disputed this point.

The ASA further found that, because the snap was created by Ms Simpson for Diamond Whites, it was the company's responsibility to ensure that promotional activity was compliant with the CAP Code.

When considering the crux of the complaint, the ASA noted that ads must be *obviously* identifiable, not just identifiable. The ASA considered that the snap was distinguishable from Ms Simpson's usual snaps of her personal/social life, and that the promotional offer text and inclusion of Diamond White's website URL may indicate a commercial relationship between the parties. However, they did not think that any other content or context of the snap made it clear that it was advertising rather than genuinely independent editorial content.

Further, though noting Diamond Whites' view that Ms Simpson's followers would be aware of their commercial relationship, the ASA considered that it would not be clear to all Snapchat users, particularly those new to the app.

For all those reasons, the ASA concluded that the snap breached the Code.

Why is it important?

It is interesting that even if there was no explicit agreement between the parties on this promotion, the same result would (apparently) have been reached. This implies a pretty significant burden on companies to ensure that individuals known to endorse their product always use the appropriate hashtags etc.

It is also notable that the ASA took the perspective of what is "obviously identifiable" marketing material from the perspective of a naïve Snapchat user as opposed to the average Snapchat user, or the average Ms Simpson follower.

Any practical tips?

If the ASA maintains that all publications related to a product which are created by an individual known to endorse that product constitute marketing communications, then guidelines or contractual provisions stipulating the use of hashtags etc. may be advisable.

This decision illustrates the benefit of Snapchat as a means of advertising. Unlike other forms of media, the post was gone within 24 hours. This meant that Diamond Whites did not have to remedy the advert itself, they only committed to ensuring that all appropriate hashtags etc. were used in the future.

ASA

ASA Ruling on Nomad Choice Pty Ltd t/a Flat Tummy Tea (13 September 2017) – level of care required for health claims

The question

What level of care should be taken when making health claims via celebrities?

The facts

Sophie Kasaei, a TV personality, posted a "before and after" style image of herself on Instagram with the caption: "*#ad Tummy Game Plan? You know it's @flattummytea. Nothings gonna get you flat the same as this tea will. The excuses are in the past, much like the water weight I used to have.*"

The images featured Ms Kasaei wearing the same sportswear and holding two sachets of tea one named "ACTIVATE" and one named "CLEANSE". In the left hand image, her stomach was distended whilst in the right hand image her stomach appeared flatter.

The complaints

The EU Regulation No.1924/2006 (the Regulation) only permits claims related to health to be used in marketing communications if they are listed as authorised on the EU register of nutrition and health claims (the Register). The CAP Code reflects these requirements.

There were two complaints, both of which questioned Nomad Choice Pty Ltd t/a Flat Tummy Tea's (NCP's) compliance with the above:

- The complainant challenged the claims which implied that the tea could help with water weight
- The ASA challenged the product name "Flat Tummy Tea".

The response

NCP said they were not aware of the Register or that their product name and advertisement claims would need to be compliant with the Regulation. They also stated that they did not hold scientific data to support their claims that the tea ingredients could help with water weight loss.

The decision

Complaint 1:

The ASA found that the average consumer would interpret Ms Kasaei's caption to mean that the product would enable them to reduce water weight and obtain a flat stomach. In addition, they found that the consumer would interpret the image as a demonstration of the tea's effect.

The ASA further found that consumers would understand the reduction of water weight and achievement of a flat stomach to be beneficial health effects of consuming the product.

As NCP did not identify any authorised health claims on the Register, the ASA concluded that the Instagram post breached the CAP Code.

Complaint 2:

For the same reasoning as above, the health claim implicit in the brand name "Flat Tummy Tea" also breached the Code.

The ASA did note an exemption in Article 28(2) of the Regulation in respect of trademarks and brand names, namely that trademarks and names which convey a health claim but existed before 1 January 2005 are not caught by the EU law. However, "Flat Tummy Tea" was not registered as a trademark before 2005 so that exemption had no application.

Why is it important?

This type of mistake could be very costly. A company in NCP's position would either have to seek EU authorisation or (more likely) change its approach to marketing.

If the complaint had been limited to the first issue, this would not be too damaging as it would just require removing that particular Instagram post. However, where a trademark or name is found to be in breach, the product may have to be recalled and all marketing communications rebranded. Aside from the obvious expenditure and wasted product, there are more subtle costs to consider such as bad press, lost management time, and a potentially ruined relationship with a celebrity endorser. Notably, Ms Kasaei received substantial criticism from various national newspapers and magazines following the incident.

It is also significant that the ASA considered both: (i) the interpretation of the advertisement (ie whether it made a claim on water weight); and (ii) whether that interpretation was a health claim from the perspective of the "average consumer".

Any practical tips?

When it comes to health, err on the side of caution. Though tempting to make use of society's ever-increasing interest in fitness, beauty and nutrition, a small exaggeration or lack of clarity over product advertising could have a disproportionately negative effect.

Take particular care with fixed branding such as names, logos and trademarks (unless registered before 2005). Also remember that images (such as NCP's "before and after" picture) are just as vulnerable to ASA scrutiny as text.

And lastly, always review your branding from the perspective of the consumer. When considering whether an advert makes a health claim, the question is not whether you, your doctor or even the ASA think it is health-related, but whether your average consumer would. This may be particularly pertinent if you are advertising on social media sites and/or engaging celebrities who have a relatively young fan base.

ASA

ASA Ruling on Wahoo Fitness (UK) Ltd (15 November 2017) – editorial control over advertorials

The question

What constitutes "editorial control" for the purpose of determining whether video content is an advertorial?

The facts

The YouTube channel Global Cycling Network (**GCN**) uploaded two videos, both featuring Wahoo Fitness (Wahoo) products:

- video A featured a vlogger introducing the Wahoo product to viewers by unboxing it, giving viewers the chance to win it, and discussing its different features and how to use it. Text beneath the video stated "*[t]hanks to Wahoo Fitness for the products used in this video. All views expressed in this video are the presenter's own*" and further down read "*[t]hanks to our sponsors…*" before listing various sponsors, including Wahoo, and
- video B featured two vloggers devising a challenge using the Wahoo product. During the video, a voice-over stated the product's uses and different features, and the video ended with one of the vloggers inviting the viewer to learn more about the product by clicking on links to other content. The same text stated above appeared beneath the video.

The complaint

The complainant challenged whether the ads were obviously identifiable as marketing communications.

The response

GCN confirmed that they had a commercial relationship with Wahoo but described Wahoo as a sponsor only. They denied that the videos were advertising because Wahoo did not have any editorial control over the content – their influence was limited to fact-checking technical details of the product.

The contract between the parties included an agreement that Wahoo would pay GCN for three Wahoo-branded videos, in which the content and subject would be agreed between the parties. The contract required an "unboxing" video and a competition for Wahoo products to be featured on the channel. The contract also specified that the GCN presenters ride with Wahoo head units in all “relevant” channel content during the three year term of the contract.

Wahoo also said that they believed the videos to be part of a sponsorship deal as opposed to advertisements. They confirmed that they had supplied Wahoo products to GCN for the videos.

The decision

The ASA upheld the complaint.

The first question was whether the videos were advertorials and therefore within the remit of the CAP Code. Advertorials are defined in the Code as advertisement features in which the content is controlled by the marketer as opposed to the publisher and there is a reciprocal relationship, for example dissemination in exchange for payment.

The ASA found that the videos were disseminated in exchange for payment, as they were produced in the context of the financial agreement between GCN and Wahoo.

When considering which party was the controller, the ASA accepted that merely fact-checking details of a video is not enough in itself to constitute editorial control. However, the ASA found that Wahoo was in fact the controller in respect of both videos:

- in relation to Video A, GCN was contractually bound to “unbox” the product and to run the competition. In addition, the contract stated that the content and subject of the video was to be agreed between the parties in advance, and
- in relation to Video B, the GCN presenters were bound to ride wearing the Wahoo head units in all “relevant” content. The ASA noted that the wording allowed the parties to determine which content would be “relevant” and that the specific content of the videos was not stipulated. However, the fact that GCN were nevertheless contractually obliged to feature the head units in any content deemed “relevant” during the term implied that Wahoo, and not GCN, were the party in control and therefore the video constituted an advertorial.

The second question was whether the advertorials were obviously identifiable as marketing communications. The ASA considered that the text beneath the videos was insufficient to clearly identify the videos as advertisements and, in any case, noted that the description box was not immediately visible. The ASA also noted that there was nothing within the video content to indicate that the videos were advertising. The ASA therefore found that the videos were not identifiable as marketing communications and therefore were in breach of the Code.

Why is it important?

This decision makes it clear that the ASA construe the concept of "editorial control" broadly.

Even though Wahoo did not have any influence on the script or other specifics of the video content, they were still deemed to be the controllers, ostensibly because they had been fairly prescriptive about how the products would appear in the videos.

Notably, the ASA interpreted ambiguity against Wahoo. They appeared to have construed the term "relevant" objectively, by accepting that wherever there was a relevant video, GCN were obliged to feature the product. No consideration was given to the possibility of GCN having a degree of discretion as to whether content was relevant or not.

Any practical tips?

If you want to enter a commercial agreement as a sponsor, do not be overly prescriptive as to how your product is shown or used. Refrain from specifying a format, and definitely do not oblige the other contracting party to feature the product in particular content or by reference to a particular descriptor (eg "relevant" content).

The decision is also useful in that it appears that reserving the right to fact-check technical details of a product does not in itself constitute editorial control.

ASA

ASA Ruling on Bonne Terre Ltd t/a Sky Bingo (2 August 2017) – responsibility for marketing communications

The question

What does an advertorial need to display in order to be clearly identified as a marketing communication for the purposes of the CAP Code, and who bears responsibility for a breach?

The complaint

An advertorial displayed on DailyTopLinks.com promoting Sky Bingo Casino featured the text "*EXCLUSIVE REPORT: ABERDEEN CITY MCDONALD'S EMPLOYEE WINS £296,121 ON HER LUNCH BREAK …*". Slightly below this was smaller text that stated "*Published on 24-01-2017 By Christine Perry, Daily News UK …*". The advertorial then featured the text "*Amelia Smith showed up for her morning shift at McDonald's like any other day, but what happened on her break would change her life forever …*". The advertorial stated how she had won the quoted amount of money and detailed the hardships she had previously endured.

At the bottom of the advertorial was text that stated "*DailyTopLinks.com is a general interest website containing articles about a wide variety of subjects. Many of these articles are what is [sic] commonly referred to as Advertorials. THIS IS AN ADVERTISEMENT AND NOT AN ACTUAL NEWS ARTICLE, BLOG, OR CONSUMER PROTECTION UPDATE. The term "advertorial" is a combination of "advertisement" and "editorial" written in an editorial format as an independent news story, when in fact the advertisement may promote a particular product or interest. Advertorials take factual information and report it in an editorial format to allow the author, often a company marketing its products, to enhance or explain certain elements to maintain the reader's interest. A familiar example is an airline's in-flight magazines that provide an [sic] editorial reports about travel destinations to which the airline flies*".

The complainant challenged whether the advertorial was clearly identified as a marketing communication.

The response

Sky Bingo stated in response that the advertorial was posted by a third-party affiliate (Moojah Ltd) in breach of its contractual obligations to Sky Bingo, which had no involvement in creating or authorising the ad's content.

On being notified of the complaint, Sky Bingo contacted the affiliate. It informed the affiliate that the ad was unacceptable, and would not be tolerated. As a result the ad was taken down on the same day Sky Bingo received notice of the complaint.

Sky Bingo stated that it was dedicated to ensuring that its marketing was compliant, and had a robust marketing approval process together with on-going training for all employees involved in marketing. Affiliates were contractually required to comply with the advertising codes and have all ads approved by Sky Bingo in advance. On this occasion the advertorial had not been submitted to Sky Bingo for clearance. If it had been, it would have been rejected. Furthermore, Sky Bingo monitored their affiliates' activities using third-party software and also sent them regular communications regarding compliance.

The decision

The ASA upheld the complaint.

The ASA acknowledged that Sky Bingo had procedures in requiring affiliates to submit their ads for approval before publication, and that those procedures had not been followed in this case. Consequently, Sky Bingo had not authorised the ad. However, CAP Code rule 1.8 provides that primary responsibility for observing the Code falls on marketers. Others involved in preparing or publishing marketing communications, such as agencies, publishers and other service suppliers, also accept an obligation to abide by the Code.

The ASA noted that the advertorial was presented like a news article with a headline at the top along with smaller size text underneath it stating, "*Published on 24-01-2017 By Christine Perry, Daily News UK …*". This, together with the story about the woman named "Amelia Smith" winning £296,121 from Sky Bingo was sufficient to initially imply that the advertorial was an editorial piece which had been written by an independent third party.

The top of the advertorial did not feature a header identifying it as an ad. The small print explaining that the advertorial was "*AN ADVERTISEMENT AND NOT AN ACTUAL NEWS ARTICLE …*" was located at the very bottom of the page. If that notice had been prominently presented, the ASA considered that it would have immediately clarified to consumers from the outset that they were reading an ad rather than editorial content.

As a result, the ASA considered that consumers were likely to understand that the advertorial was editorial content. It therefore concluded that the ad had not been clearly identified as a marketing communication, in breach of CAP Code (Edition 12) rules, 1.8 (Compliance), 2.1 and 2.4 (Recognition of marketing communications).

Why is this important?

This ruling underscores two key messages. Firstly, it's marketers who bear primary responsibility for observing the Code. The ASA accepted that the affiliate had published this ad without authorisation, and that immediate corrective action had been taken, but this was not enough for Sky Bingo to avoid an adverse ruling.

Secondly, marketers and advertisers must clearly mark advertorials as marketing communications from the outset. It will not be sufficient to hide explanations in the small print at the bottom of articles – notices should be prominently displayed in the header of the content.

Any practical tips?

It may be tempting to avoid clear signposts that an ad is marketing, particularly when it takes the form of an advertorial, post on social media, or similar. Advertisers may think that the ad will have a greater impact if it appears to be produced by a third party. The message from the ASA is clear – do not be tempted! In finding new ways to engage with consumers, marketers must not be misleading.

The ASA will not take kindly to marketers attempting to dodge blame for non-compliant adverts. Marketers should keep their advertising affiliates on a (very) short leash if they want to avoid negative publicity for non-compliance with the Code. However, as this decision shows, even that is sometimes not enough.

ASA

ASA Ruling on American Express Services Europe Ltd (American Express) (9 August 2017) – qualification of headline claims

The facts

The ASA has banned American Express' "*Everything Has an Upside*" ad for their Platinum Cashback Everyday Credit Card, after ruling that it had exaggerated the claim that consumers get 5% cashback on all purchases.

The complaint

The TV advert, seen in April 2017, featured different situations that could result in unexpected spending, such as a plumbing leak or dropping a mobile phone in water. A voice-over stated, "*Sometimes we have to pay for things we don't actually like. But there is an upside to everything. There is a card that could give you 5% cashback on all purchases. Even the ones that didn't go to plan. So switch now to the American Express Platinum Cashback Everyday Credit Card. Search Amex Cashback*".

On-screen small print stated "*Minimum annual spend for cashback eligibility is £3,000. 5% cashback in your first three months of Card membership. Maximum £100. Up to 1% cashback thereafter*".

Two complainants challenged whether the claim "*There is a card that could give you 5% cashback on all purchases*" was misleading and exaggerated the cashback offer.

The response

American Express said that the average consumer would not understand the claim "*There is a card that could give you 5% cashback on all purchases*" as an absolute claim when heard and seen in combination with the qualification that appeared at the bottom of the screen at the same time as the claim was made in the voice-over. The voice-over also included an over emphasis on the word "*could*" which also underscored the limitations inherent in the campaign.

Text stating "*Terms, exclusions and limitations apply*" appeared in bold alongside the APR and American Express said that the advert made it clear via the on-screen text that the cashback was subject to a maximum cashback amount of £100, the rate dropped to 1% after three months, and there was a minimum annual spend of £3,000.

American Express considered that this information was sufficiently prominent and clarified the headline claim, but did not contradict it. They did not believe that the advert was misleading or that it exaggerated the cashback offer. They said that it was common industry practice for cashback offers to contain those types of clarifications.

Clearcast said that they asked American Express to change the claim to state "*could*". They had also asked American Express to amend the voice-over to make clear that the offer was only available to new customers. Clearcast considered that the combination of the voice-over, and the bold text and fundamental terms, exclusions and limitations set out in the on-screen text made it clear that "*5% cashback on all purchases*" was not an absolute claim.

The decision

Whilst the ASA acknowledged American Express' proactive attempt at transparency, it said that the campaign had significant limitations and these were not adequately brought to the consumers' attention. It stated that the font used for the disclaimers was small and the text describing the significant conditions was situated within a larger block. The ASA considered that the qualification was not sufficient to override the impression given by the headline claim that customers would be able to get 5% cashback on all purchases without limitations. It therefore concluded that the advert was misleading.

Why is this important?

Marketing teams always want to run with the boldest headline claim they can, even though there may be significant limitations to an offer (as here where the 5% cashback expired after 3 months). This case is important because it underlines the fact that qualifications to headline claims often simply won't work. What isn't clear is the extent to which the claim might have survived had the qualification been more prominent. The ASA adjudication is not clear on this.

The case is also a helpful reminder that, just because you get Clearcast clearance, doesn't mean you're in the clear.

Any practical tips?

As a working practice, always try and avoid small print which qualifies a headline claim. It puts you on the back foot, however prominent you make the qualification. The ASA adjudication suggests that prominence may count – and of course it might just work if it really is prominent enough for the consumer to view and digest it so as to be able to make an informed decision. But be careful – the ASA generally takes a hard line on the qualification of headline claims.

ASA

ASA Ruling on News UK & Ireland Ltd t/a News UK (18 October 2017) – estimating demand in promotions

The facts

The Times ran a promotion offering "two Legoland tickets for £10" upon the collection and redemption of four unique codes. The small print at the bottom of the promotion included "*subject to availability*" but did not include a closing date.

The complaints

Two complainants challenged the promotion on the grounds that it was misleading and did not comply with the Code because it was their belief that the advertiser had not made a reasonable estimate of demand. Another challenged the promotion on the grounds it was misleading because the promotion did not display a closing date.

The response

- Despite the fact that it was the first time that the Times had offered tickets to be acquired by token collection with a payment element, News UK believed that it had made a reasonable estimate of demand based on previous promotions which included free or discounted experience offers. The examples it gave were promotions for free Legoland tickets run by Times+ that had 10,000 redemptions and Alton Tower tickets by the Times which had 15,000 redemptions. These two promotions (which involved the collection of four tokens) were for the redemption of free tickets and the dates that the tickets were available fell on the school holidays. The promotion in contention however had availability from 10 March to 15 May 2017 and the redeemer had to pay £10 for two tickets. Taking these factors into account, News UK believed that the Legoland promotion would be less attractive than the Times+ or Alton Towers promotions. Notwithstanding this, News UK purchased 35,000 pairs of tickets for the promotion.

  News UK received 500 direct requests for tickets after the tickets were exhausted which it believed was partly due to the fact that a prominent journalist had mentioned their promotion on breakfast TV and on a popular finance website. This led to the promotion being featured on multiple discount channels without their direct involvement, which they had not anticipated at the time. News UK explained that as the sudden spike in demand occurred after the final day of in-paper advertising, it was unable to remove or alter the ads in the newspapers. Customers would however be aware that the tickets had run out because they would receive an error message when they tried to book an available date to attend Legoland. To avoid disappointment, News UK released an additional 500 pairs to the entrants who had contacted them.

- The closing date was included in the full terms and conditions, but News UK stated that in future promotions it would ensure that it would include a closing date in a more prominent place. News UK also stated that it had believed that the tickets allocated for the promotion would not be exhausted by the end of the promotion and therefore the closing date had not been extended. Furthermore, News UK believed that customers would know that they needed to book quickly to secure their preferred date and therefore News UK did not believe that the non-inclusion of the closing date would materially disadvantage any customers.

The decision

- The ASA found that News UK had been reasonable in basing the estimate for this promotion on promotions conducted in the past, notwithstanding the fact that these previous promotions were not strictly identical to the Legoland promotion. Furthermore, the ASA acknowledged that the spike in demand was due to the promotion's unexpected feature on breakfast TV which News UK could not have predicted although it was common for discount websites to share information about promotions.

  The ASA did however note that the inclusion of "*subject to availability*" did not relieve promotors of their obligation to do everything reasonable to avoid disappointing customers. The CAP code requires promotors to communicate with consumers in a timely manner and, if appropriate, offer a refund or a reasonable substitute product if they cannot meet estimated demand. Other than release an additional 500 pairs of tickets to customers who had contacted them directly, News UK did not further communicate with and either refund or offer a reasonable substitute to customers more widely. This was deemed likely to have caused disappointment and detriment to consumers who purchased the newspapers to obtain the codes and as such the promotion was found to be misleading and had not complied with the CAP Code.

- The ASA acknowledged that the closing date was in the full terms and conditions but as a significant condition, it should have been more prominently displayed. Furthermore the dates that were displayed differed from the actual closing date and that, coupled with the fact that the promotion was subject to availability, meant that it was imperative that the consumers understood how long they had to redeem the codes in order to receive the tickets.

  The ASA ruled that the ads for future promotions must include the closing date and that if they were unable to supply demand because of some unanticipated factor outside their control, then they must ensure relevant timely communication with applicants and consumers and, in cases of any likely detriment, offer a refund or a reasonable substitute product.

Why is this important?

News UK had gone through the hoops and proved that it had made a reasonable estimate of the demand for tickets. But the ASA put significant weight on the fact that they had not communicated properly to consumers once the tickets had run out. It's hard to see quite what else News UK could have done here, especially in terms of providing a reasonable substitute when the tickets ran out, albeit it's likely that extra communication would have helped. So what the case seems to be really saying is plan ahead – ie think about the communications you will post if demand exceeds supplies, and consider what you will offer in advance as a reasonable substitute.

Any practical tips?

When preparing a redemption promotion, think through the practical steps you will take should you run out of stock. Work out the messaging for this eventuality ahead of the start of the promotion, so that you can deploy this immediately should your promotion prove too popular. Think also on a substitute product you can offer participants. And, if there is a closing date, always flag this prominently.